CAUSE NO.: [illegible] 91-5013

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

WILLIAM O. TRIGG,	)
Petitioner,	)
v.	)
UNITED STATES OF AMERICA,	)
Respondent	)

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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William O. Trigg

QUESTION PRESENTED FOR REVIEW

Whether an arrest which can be demonstrated to be pretextual on the basis of objective evidence is unreasonable under the Fourth Amendment?

PARTIES TO THE ACTION

The names of all parties to the action in the lower court appear in the caption of this case.

TABLE OF CONTENTS

Opinions of Other Courts 1

Jurisdictional Statement 2

Constitutional Provisions Which the Case Involves. 2

Statement of the Case

A. Procedural History of the Case. 3

B. Statement of Facts Necessary to Resolve Issue Presented 4

Reasons For Granting the Writ

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE IT PRESENTS A SUBSTANTIAL AND IMPORTANT QUESTION OF FOURTH AMENDMENT LAW UPON WHICH THE DECISIONS OF SEVERAL OF THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT. 8

Conclusion 14

TABLE OF AUTHORITIES

CASES:

Colorado v. Bertine, 479 U.S. 367, 107 S. Ct. 738 (1987) 11

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979) 11

Gustafson v. Florida, 414 U.S. 260, 94 S. Ct. 488 (1973). 13

Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778 (1985). 10

Scott v. United States, 436 U.S. 128, 98 S. Ct. 1717 (1978) 10, 11, 12

South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976) 11, 13

United States v. Causey, 834 F.2d 1179 (5th Cir. 1987) 9, 10, 13

United States v. Cummins, 920 F.2d 498 (8th Cir. 1991). 10

United States v. Gusman, 864 F.2d 1512 (10th Cir. 1988). 9, 11

United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973). 13

United States v. Smith, 799 F.2d 707 (11th Cir. 1986) 9

United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989) 1, 3, 8, 9

United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991) 1, 2, 4, 9

United States v. Vilamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573 (1983). 10, 11

STATUTES:

18 U.S.C. § 3231 4

19 U.S.C. § 1581(a). 12

21 U.S.C. § 841(a)(1). 3

28 U.S.C. § 1254 2

28 U.S.C. § 1291 4

OTHER AUTHORITY:

2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965). 14

1 W. LaFave, Search and Seizure § 1.4(e) at 94 (2nd ed. 1987). 14

I.

OPINIONS OF OTHER COURTS

On August 16, 1988, United States District Court for the Northern District of Indiana, Fort Wayne Division, issued an opinion granting the motion of the petitioner, William O. Trigg, to suppress certain evidence seized pursuant to his arrest by Allen County, Indiana, police officers. On July 12, 1989, the United States Court of Appeals for the Seventh Circuit issued an opinion reversing the District Court and remanding the case for further proceedings consistent with the opinion of the Court of Appeals. United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989). On November 7, 1989, United States District Court for the Northern District of Indiana, Fort Wayne Division, issued an opinion denying the petitioner's Motion to Suppress Evidence. The petitioner ultimately entered a conditional plea of guilty preserving for appeal the suppression issue. On February 27, 1991, the United States Court of Appeals for the Seventh Circuit issued an opinion affirming the petitioner's conviction. United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991).

II.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court to entertain Petitions For Writ of Certiorari is invoked pursuant to Supreme Court Rule 10.1 and 28 U.S.C. § 1254. The United States Court of Appeals for the Seventh Circuit affirmed the petitioner's conviction in a written opinion issued February 27, 1991. United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991). Mr. Trigg did not file a Petition for Rehearing. By order dated May 17, 1991, Justice Stevens extended the time for filing this Petition For Writ of Certiorari to and including June 27, 1991.

III.

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

United States Constitution
Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

IV.

STATEMENT OF THE CASE

A. Procedural History of the Case

On March 16, 1988, the petitioner, William O. Trigg, was arrested by officers of the Allen County, Indiana, Police Department ostensively for the offense of driving without a valid operator's license. During a search of Mr. Trigg's person pursuant to that arrest, officers discovered two packages in his coat pockets which contained cocaine. On March 18, 1988, Mr. Trigg was charged by criminal complaint with violation of 21 U.S.C. § 841(a)(1), possession of cocaine with intent to distribute. (R. 1). On April 15, 1988, Mr. Trigg was indicted on the same charge. (R. 13). Prior to trial Mr. Trigg filed a Motion to Suppress Evidence and following an evidentiary hearing the District Court granted that motion and issued a written opinion on August 16, 1988. (R. 67).

The United States appealed the decision of the District Court and on July 12, 1989, the United States Court of Appeals for the Seventh Circuit reversed the decision of the District Court suppressing the evidence and remanded the case for further proceedings consistent with the Court's opinion. (R. 77). United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989).

The District Court heard further argument on the Motion to Suppress on September 18, 1989, and on November 7, 1989, entered its order denying the motion. (R. 85). On November 15, 1989, the petitioner entered a conditional plea of guilty to the charge pursuant to Fed. R. Crim. P. 11(a)(2) preserving the right to appeal the court's ruling on the Motion to Suppress, and on January 24, 1990, the court sentenced the defendant to a term of imprisonment of one hundred and twenty (120) months to be followed by a five year term of supervised release.

The petitioner sought further review in the United States Court of Appeals for the Seventh Circuit and on February 27, 1991, that Court issued its opinion affirming the District Court. United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991). Mr. Trigg did not seek rehearing in the Court of Appeals. On May 17, 1991, Justice Stevens extended the time for filing this Petition For Writ of Certiorari to and including June 27, 1991.

The District Court had jurisdiction in this case pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

B. Statement of Facts Necessary to Resolve Issue Presented

The following recitation of the facts, including citations to the transcript of the evidentiary hearing held on the petitioner's Motion to Suppress by the United States

District Court for the Northern District of Indiana on June 20-21, 1988, is taken verbatim from the District Court's order of August 16, 1988. (R. 67). The District Court restated those facts somewhat more briefly in its order of November 7, 1989. (R. 85).

> On February 1, 1988, defendant Trigg was arrested on a body attachment. (Tr., p. 30). Allen County police officers Philip Bird and Dan Edenfield, who worked in the warrants and fugitive division at that time, (see Tr., pp. 27, 132), were attempting to serve a felony drug warrant on a person named James Mudd when they encountered Trigg. (Tr., p. 28). Trigg was driving a brown Jeep and Officers Bird and Edenfield were following him. (Tr., p. 29). Trigg pulled over. (Tr., p. 29). Bird and Edenfield were going to drive on by, but Trigg got out of his Jeep and began waving his arms in the middle of the road. (Tr., p. 29). Bird saw Trigg and he and Edenfield stopped their police car in the middle of the intersection, approaced Trigg and asked him, "What's going on? Who are You? What do you want?" (Tr., p. 29).
>
> Trigg told them who he was and they arrested him for an outstanding body attachment. (Tr., pp. 29-30). He was then transported to the lockup, and the body attachment was processed. (Tr., p. 40). During the process of arresting Trigg on the body attachment, the officers discovered that his license was suspended. (Tr., p. 30)[1/].
>
> Trigg was not arrested for driving with a suspended license. (Tr., p. 31). Neither of the officers informed Trigg that his license was suspended, and there is no dispute that there was ample opportunity for them to do that. (Tr., p. 31). Two reasons were given by the officers for not attesting Trigg on the suspended license: they say they did not see him driving (which the court finds hard to believe

1/ There is an immaterial dispute about whether this was discovered when Trigg was first arrested, while in the police car, or while he was in the lockup. The court finds that the police officers first discovered the suspended license in the lockup.

since they were following behind him), (Tr., p. 31), and they say that it is not normal for a warrants officer to make a traffic arrest. (Tr., p. 31). Trigg informed Officer Bird, however, that he was in fact driving the vehicle. (Tr., p. 31).

After defendant Trigg had been processed on the body attachment, his license was returned to him, (Tr., p. 144), and he was released from custody. (Tr., p. 144). Trigg, as noted earlier, was never informed by the officers that his license was suspended and he had no independent knowledge that his license was suspended. Trigg had had problems with his license prior to February 1, 1988. (Tr., p. 146). It was suspended in August, 1987, when he failed to take action on some speeding tickets. (Tr., p. 146). But he was told that his license was valid when he called on December 15, 1987, after he had paid the tickets. (Tr., p. 146). So on February 1, 1988, Trigg supposed that he had a valid driver's license. (Tr., p. 147).

Trigg never heard anything about the suspended license again until March 16, 1988. On that date Officer Bird, who had just been assigned to the narcotics division, arrived at work early and found the doors locked. (Tr., p. 32). He and another officer, Officer Balliet, who had temporarily been assigned to the narcotics division, decided to "go out and check some of the crack houses for traffic and check some of the other known houses that were suspect in that type of activity." (Tr., p. 32). As they were driving to Trigg's house, which was not a residence under surveillance as a suspected narcotics house, (Tr., pp. 53, 121), they noticed a 1985 maroon Cadillac. (Tr., p. 32). The Cadillac was distinctive and Bird remembered seeing it a week before at a known crack house. (Tr., pp. 32, 53).

Bird and Balliet decided to set up surveillance on Trigg's house, but broke off surveillance temporarily to call Sgt. Colby, who was in charge of the narcotics division, to ask him whether surveillance should be maintained. (Tr., p. 33). Colby advised Officer Balliet to get into his vehicle, and advised Officer Bird to keep point on the surveillance. (Tr., p. 120). He further advised another officer, Officer Huffine, to stay in the vehicle which he was driving so that three mobile units would be present. (Tr., p. 120). like Bird, Colby knew that Trigg's license was suspended. (Tr., p. 120). He found that out during some investigations that were conducted just a week or two prior to March 16, 1988. (Tr., p. 120).

Eventually, Trigg got into the Cadillac and drove away. (Tr., pp. 33-34). Before Trigg had gotten into his automobile, the officers had checked to make sure that his license was still suspended. (Tr., p. 35). As Trigg drove away from his home, the narcotics officer maintained surveillance (in their three cars) and a traffic officer named David Royse, also of the Allen County Police Department, was called and asked to "assist in making a traffic stop on a suspended driver." (Tr., p. 75). By the time Royse got to Trigg he was in a private laundromat parking lot in a shopping center. (Tr., p. 81). Royse handcuffed Trigg and placed him under arrest for driving while suspended. (Tr., p. 77). Royse could have simply issued Trigg a traffic citation, (see Tr., p. 79), but he chose instead to make a custodial arrest and take Trigg to jail. (Tr., p. 79).

Trigg was planning to do laundry and had a big bag of dirty clothes. (Tr., p. 148). He didn't want anyone to see him with the clothes (he was probably embarrassed) and was attempting to pull around the back of the laundromat when Officer Royse pulled into the parking lot and jumped out of his car with a revolver to arrest Trigg for driving on a suspended license, a misdemeanor. (Tr., p. 148). Royse then handcuffed Trigg. (Tr., p. 149). Trigg never attempted to flee. (Tr., p. 148)[2]/. After Royse had handcuffed Trigg, Officer Huffine, also a narcotics officer, did a pat down search of Trigg. (Tr., pp. 78, 94, 95). By that time all six narcotics officers had arrived. During the pat down search, Huffine discovered two packages in Trigg's coat pockets containing cocaine. (Tr., pp. 95, 96). Trigg was not armed.

2/ Royse testified that when he attempted to arrest Trigg, Trigg attempted to flee. (Tr., p. 79). Trigg testified that he did not attempt to flee. (Tr., p. 148). Based on the credibility of the witnesses and the surrounding circumstances the court finds that Trigg did not attempt to flee and the court specifically discredits Royse's testimony on that point. Trigg was simply going to do his laundry. Royse was brandishing his pistol. Trigg was unarmed. Further, it is undisputed that Trigg waved the police car down on February 1, 1988, when he was arrested on the body attachment. The court simply doesn't believe Mr. Trigg attempted to flee on March 16, 1988.

There are a number of extremely important undisputed facts which the court wishes to emphasize. Trigg was never informed by any officer after the February 1, 1988 arrest on the body attachment that his license had been suspended. (Tr., pp. 61, 144). Second, the narcotics officers considered Trigg a suspect of narcotics trafficking on March 16, 1988. Lastly, none of the narcotics officers, however, had probable cause to believe Trigg had narcotics on his person and they testified to that effect. (Tr., pp. 73, 81, 99, 123).

V.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE IT PRESENTS A SUBSTANTIAL AND IMPORTANT QUESTION OF FOURTH AMENDMENT LAW UPON WHICH THE DECISIONS OF SEVERAL OF THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT.

The instant case concerns the analysis to be applied in determining the objective reasonableness of an arrest challenged as unconstitutional on the ground that the arrest was pretextual. In the original appeal in this case, United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989), the Court of Appeals held:

> [T]he reasonableness of an arrest depends on the existence of two objective standards. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by State or Municipal law to effect a custodial arrest for the particular offense.
>
> 878 F.2d at 1041

In announcing its decision, the Court of Appeals acknowledged that "the Supreme Court has never directly confronted the issue of pretextual arrests," 878 F.2d at 1039, and there was not controlling precedent from that

court. 878 F.2d at 1042. Accordingly, the Court of Appeals remanded the case to the District Court to apply the newly announced standard.

On the second appeal in this case, United States v. Trigg, 925 F.2d 1064 (7th Cir. 1991), the Court of Appeals specifically rejected the petitioner's argument that in determining the objective reasonableness of an arrest the court should consider whether or not in making the arrest the police departed from usual police practices. The petitioner had urged the court to adopt the position taken by the Tenth Circuit in United States v. Gusman, 864 F.2d 1512 (10th Cir. 1988) and the Eleventh Circuit in United States v. Smith, 799 F.2d 707 (11th Cir. 1986). Those two circuits have held that the proper inquiry is "not whether the officer could validly have made the stop, but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." 799 F.2d at 709. In rejecting the petitioner's position the Court of Appeals in the instant case acknowledged that the court's approach "virtually eliminates the concept of a 'pretextual arrest'". 925 F.2d at 1066.

As noted above the decision of the Seventh Circuit in this case is in conflict with prior decisions of the Tenth and Eleventh Circuits. It is, however, consistent with decisions of the Fifth Circuit in United States v. Causey,

834 F.2d 1179 (5th Cir. 1987) (en banc) and the recent decision of the Eight Circuit in United States v. Cummins, 920 F.2d 498 (8th Cir. 1991) (Petition for Cert. filed April 17, 1991, No. 90-1628). Thus, there is a significant division among the several Courts of Appeal in regard to a substantial question of Fourth Amendment law upon which there is no guiding precedent from this Court.

The petitioner submits that the position taken by the Seventh Circuit is inconsistent with the core concept of the Fourth Amendment that citizens are to be protected against the arbitrary exercise of police authority. The approach adopted by the Tenth and Eleventh Circuit promotes this objective while the approach taken by the Fifth, Seventh, and Eight Circuits ignores it.

The Seventh Circuit and those following its approach have based their decisions on a trilogy of Supreme Court case: Maryland v. Macon, 472 U.S. 463, 105 Sup. Ct. 2778 (1985); United States v. Vilamonte-Marquez, 462 U.S. 579, 103 Sup. Ct. 2573 (1983); Scott v. United States, 436 U.S. 128, 98 Sup Ct. 1717 (1978). The petitioner agrees that these are controlling precedent, but contends that the Seventh Circuit reads too much into these opinions while at the same time placing insufficient emphasis on cases which recognize that arbitrary police practices are unreasonable

under the Fourth Amendment. Colorado v. Bertine, 479 U.S. 367, 107 Sup. Ct. 738 (1987); Delaware v. Prouse, 440 U.S. 648, 99 Sup. Ct. 1391 (1979); South Dakota v. Opperman, 428 U.S. 364, 96 Sup. Ct. 3092 (1976).

Scott made clear that in evaluating the reasonableness of police action under the Fourth Amendment "the underlying intent or motivation of the officers involved" is not relevant. 436 U.S. at 136, 98 Sup. Ct. at 1723. Virtually all courts which have considered the question of pretextual arrest since Scott was decided have concluded that an objective analysis is appropriate. The courts do not agree, however, on what objective elements are dispositive in determining whether a pretextual intrusion is unconstitutional. United States v. Gusman, 864 F.2d 1512, 1515 (10th Cir. 1988). The dispute centers upon the question of whether the fact that officers departed from established police practice is a fact to be considered in determining whether a particular police action was objectively reasonable.

In its original opinion in this case the Court of Appeals relied primarily upon United States v. Villamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573 (1983) in concluding that usual police practices have no place in the analysis. In that case customs agents accompanied by a state police officer were patrolling a shipping canal

leading to the Gulf of Mexico. Authorities had received a tip that a vessel in the area was carrying marijuana. (The tip was apparently a general one not focused on any vessel. The decision of the Seventh Circuit erroneously states that authorities had a tip that the vessel boarded was carrying narcotics.) The agents observed some arguably suspicious or at least unusual conduct on a vessel they passed and elected to board it to inspect the manifest and other documents. Pursuant to 19 U.S.C. § 1581(a) customs officials have the authority to board a vessel at any time and at any place within the United States to inspect documents. In the course of boarding to inspect the documents the agents smelled and later discovered marijuana.

The issue before the Supreme Court was the constitutionality of the statute, not the reasonableness of the police conduct. Neither the majority or the dissent analyzed the case in terms of a pretextual search. In a footnote the Court dismissed the suggestion that the agents should not be allowed to rely on the statute because their true purpose was to search for contraband, citing Scott. The footnote does no more than reiterate the principle that the subjective intent of the officers is not relevant. The case simply does not address the question as to whether departure from usual police practices is a factor to be

weighed in determining the objective reasonableness of a search. See the analysis of Villamonte-Marquez in the dissenting opinion of Rubin, J. in United States v. Causey, 834 F.2d 1179, 1188 (5th Cir. 1987).

The Court of Appeals also relied upon language in Gustafson v. Florida, 414 U.S. 260, 265, 94 S.Ct. 488, 491-92 (1973) that the fact that an officer was not required to take a traffic violator into custody was not determinative of the constitutionality of the arrest. The court, however, ignored the very specific language in United States v. Robinson, 414 U.S. 218, 221 n. 1, 94 S.Ct. 467, 470 n. 1 (1973), the companion case to Gustafson, that the Court was specifically reserving the issue of whether a stop and arrest for a minor traffic offense might be invalid as a pretext if the arrest was "a departure from the established police practice."

The conclusion of the Court of Appeals was in no way compelled by Supreme Court precedent. Indeed, the cases the court relied on simply do not address the question of the relevancy of the arresting officer's departure from established police practices. At the same time the court ignored precedent that conformity with established police procedures is a factor relevant to determining the reasonableness of police action. Particularly applicable is South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976)

where the Court held that an inventory of the contents of an impounded automobile is reasonable only if it is conducted in accordance with established police procedures. As Professor LaFave has observed, "That arbitrary action is unreasonable under the Fourth Amendment has been recognized by the Supreme Court in a variety of ways." 1 W. LaFave, Search and Seizure § 1.4(e) at 94 (2nd ed. 1987). The desire to protect against the arbitrary exercise of police authority was one of the primary purposes prompting the enactment of the Fourth Amendment. Id. at 95 citing 2 L. Wroth & H. Zobel, Legal Papers of John Adams 141-42 (1965). By holding that the arbitrariness of the police action is not a factor to be considered in evaluating the reasonableness of that action, the Court of Appeals invites precisely the sort of abuse of police authority that the Fourth Amendment was intended to protect against.

VI.

CONCLUSION

For all of the above argued reasons William O. Trigg respectfully requests that this Court grant the Petition For Writ of Certiorari on the above argued question.

Respectfully submitted,

Robert C. Perry
Counsel of Record for the
Petitioner, William O. Trigg

CONTENTS OF APPENDIX

1. Opinion of the United States Court of Appeals For the Seventh Circuit. February 27, 1991.

2. Judgment of Conviction of the United States District Court for the Northern District of Indiana. January 24, 1990.

3. Order of the United States District Court for the Northern District of Indiana. November 7, 1989.

4. Opinion of the United States Court of Appeals for the Seventh Circuit. July 12, 1989.

5. Order of the United States District Court for the Northern District of Indiana. August 16, 1988.

In the

United States Court of Appeals

For the Seventh Circuit

No. 90-1216

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM O. TRIGG,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Fort Wayne Division.
No. 88 CR 2—**William C. Lee**, *Judge.*

ARGUED NOVEMBER 5, 1990—DECIDED FEBRUARY 27, 1991

Before CUMMINGS, EASTERBROOK, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* William O. Trigg challenges a standard set forth by this court in our disposition of his earlier interlocutory appeal. In this opinion we revisit the topic of pretextual arrests presented with familiar facts and issues. "William Trigg was charged with one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) after a search incident to a traffic arrest revealed the presence of 53 grams of cocaine in his coat pocket." *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989). In our 1989 *Trigg* opinion we provided the district court with an objective standard to be used in determining the reasonableness of Trigg's arrest. Trigg

argues today that the probable cause aspect of our objective standard wrongly excludes consideration of an officer's conformance to usual police practices. Because we are not persuaded by the defendant that the standard we enunciated in *Trigg* is incorrect, we affirm the district court's application of the objective standard to the facts in this case.

I.

In our opinion issued in Trigg's interlocutory appeal we discussed fully the facts of this case. *Trigg*, 878 F.2d at 1038. Recounting those facts in brief, police officers conducted a pat-down search of Trigg pursuant to a custodial arrest for driving with a suspended license. The search produced two packets of cocaine; Trigg was subsequently charged with possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1).

Trigg sought to suppress the cocaine prior to trial alleging that the police effected the traffic arrest as a pretext to search for narcotics. The district court agreed that the arrest was pretextual and granted Trigg's motion to suppress the evidence; the government appealed. This court acknowledged that "[t]he district judge did not have the benefit of a controlling precedent on this important issue and considered a variety of factors which we deem to be irrelevant in granting defendant's suppression motion." *Trigg*, 878 F.2d at 1042. Thus, we resolved the interlocutory appeal by remanding to the district court with instructions to apply the reasonableness standard enunciated in our opinion. *Id.* at 1041. Our standard considered only two objective factors, "[f]irst, did the arresting officer have probable cause to believe the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and/or municipal law to effect a custodial arrest for the particular offense." *Id.* After reconsidering the suppression issue with the guidance provided, the district court entered an order denying

Trigg's motion to suppress. The defendant then brought this appeal to challenge the correctness of our standard and the district court's ruling on the motion to suppress.

II.

William Trigg does not dispute the proposition that a fourth amendment analysis requires the application of an objective standard. Rather, he takes issue with the exclusion by this court of a factor which he believes should be considered. Specifically, Trigg believes that conformance to usual police practices must be factored into an objective analysis of the reasonableness of an arrest. We disagree. As we indicated in *Trigg*, the "usual practices" approach is directed to the arbitrary exercise of police power and designed to operate as a check on the abuse of discretion by officers. *Id.*

While examination of usual police practices may be useful in analyzing an officer's abuse of discretion in effecting a custodial arrest, such a factor has been rejected by the Supreme Court as one to be considered in the objective analysis of reasonable arrests. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S. Ct. 2573 (1983); *Gustafson v. Florida*, 414 U.S. 260, 94 S. Ct. 488 (1973); *see also United States v. Hope*, 906 F.2d 254 (7th Cir. 1990) (court refuses to consider usual police practices and applies a purely objective standard); *Trigg*, 878 F.2d 1037 (court rejects usual police practices as factor to be considered). The Supreme Court has never indicated that discretionary exercise of the arrest powers is constitutionally significant; instead the court has stated, "[i]t is sufficient that the officer had probable cause to arrest and that he lawfully effectuated the arrest and placed the petitioner in custody." *Trigg*, 878 F.2d at 1041 (citing *Gustafson v. Florida*, 414 U.S. at 265, 94 S. Ct. at 491-92). As we stated in *Trigg*, and in light of the position established in *Gustafson* and *Villamonte-Marquez* by the Supreme Court, we cannot consider the conformance of an arrest

to usual police practices in determining the reasonableness of an arrest. Rather, we must focus on probable cause and the lawfulness of the arrest as does the Supreme Court. We recognize that such an approach virtually eliminates the concept of a "pretextual arrest," however, we believe this approach is consistent with *Gustafson* and *Villamonte-Marquez*. This has been our position since *Trigg*, and continues to be our position today. *See United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990), *United States v. Hope*, 906 F.2d 254 (7th Cir. 1990), *United States v. Cardona-Rivera*, 904 F.2d 1149 (7th Cir. 1990).

III.

For the reasons stated above, we reaffirm that the objective standard we adopted in *Trigg* does not permit consideration of usual police practices and AFFIRM the order subsequently entered by the district court.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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United States District Court

NORTHERN District of INDIANA

UNITED STATES OF AMERICA

V.

WILLIAM O. TRIGG
Adams County Jail
P. O. Box 545
Decatur, IN 46733

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number FCR 88-00012-01

Wanda R. Cal
One Kennedy Square
Suite 2002, Detroit MI 48226
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) I after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:841(a)(1)	Possession with intent to distribute cocaine base "crack", a Schedule II Narcotic Drug Controlled Substance	I

dhm/Ausa

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.
☒ It is ordered that the defendant shall pay to the United States a special assessment of $ 50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
306-80-7322

January 24, 1990
Date of Imposition of Sentence

Signature of Judicial Officer

Judge William C. Lee
Name & Title of Judicial Officer

Date

Defendant's mailing address:
Adams County Jail
P. O. Box 545
Decatur, IN 46733

Defendant's residence address:
Adams County Jail
P. O. Box 545
Decatur, IN 46733

90.

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months.

dhm/Ausa

☒ The Court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated in a facility where he may pursue his education.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district,

☐ at _____ a.m. / p.m. on _____.
☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

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Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: William O. Trigg
Case Number: FCR 88-00012-01

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years

.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and all comply with the standard conditions that have been adopted by this court (set forth on the following e). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that defendant pay any such restitution that remains unpaid at the commencement of the term of supervised ase. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: William O. Trigg
Case Number: FCR 88-00012-01

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

15. The defendant shall not possess a firearm or any other weapon.
16. The defendant shall take part in a drug aftercare program, which may include urinalysis, and will be monitored by the United States Probation Department

BEST AVAILABLE COPY

Defendant: William O. Trigg
Case Number: FCR 88-00012-01

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 50.00 , consisting of a fine of $ 0.00 and a special assessment of $ 50.00 .

☒ These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

Count I	21:841(a)(1)	Possession with intent to distribute cocaine base "crack", a Schedule II Narcotic Drug Controlled Substance

This sum shall be paid ☒ immediately.
☐ as follows:

☐ The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

89 NOV -7 AM 8:58

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	NO. FCR 88-12
WILLIAM O. TRIGG, Defendant.	)	

ORDER

This matter is before the court on remand from the Seventh Circuit Court of Appeals with instructions to reconsider this court's order of suppression issued in this case on August 16, 1988. Oral arguments were heard on September 18, 1989. The parties were given ten days in which to file further briefing and seven days thereafter to file responses. The government filed an additional brief on September 27, 1989. The defendant has not responded. For the reasons set forth below, defendant's motion to suppress will be denied.

Factual Background

This court made the following findings of fact in its initial order granting defendant's motion to suppress. On February 1, 1988, defendant Trigg was arrested on a body attachment. Allen County police officers Phillip Bird and Dan Edenfield, who worked in the warrants and fugitive division at that time, were attempting to serve a felony drug warrant on a person named James Mudd when they encountered Trigg. Trigg was driving a brown Jeep and Officers Bird and Edenfield were following him. Trigg pulled over. Bird and Edenfield were going to drive on by, but Trigg got out of his Jeep

and began waving his arms in the middle of the road. Bird saw Trigg and he and Edenfield stopped their police car in the middle of the intersection, approached Trigg and asked him, "What's going on? Who are you? What do you want?"

Trigg told them who he was and they arrested him for an outstanding body attachment. He was then transported to the lockup, and the body attachment was processed. During the process of arresting Trigg on the body attachment, the officers discovered that his license was suspended.

Trigg was not arrested for driving with a suspended license. Neither of the officers informed Trigg that his license was suspended, and there is no dispute that there was ample opportunity for them to do that. Two reasons were given by the officers for not arresting Trigg on the suspended license; they said they did not see him driving, and they said that it was not normal for a warrants officer to make a traffic arrest. Trigg informed Officer Bird, however, that he was in fact driving the vehicle.

After defendant Trigg had been processed on the body attachment, his license was returned to him, and he was released from custody. Trigg, as noted earlier, was never informed by the officers that his license was suspended and he had no independent knowledge that his license was suspended. Trigg had had problems with his license prior to February 1, 1988. It was suspended in August, 1987, when he failed to take action on some speeding tickets. But he was told that his license was valid when he called on December 15, 1987, after he had paid the tickets. So on February

1, 1988, Trigg supposed that he had a valid driver's license.

Trigg never heard anything about the suspended license again until March 16, 1988. On that date Officer Bird, who had just been assigned to the narcotics division, arrived at work early and found the doors locked. He and another officer, Officer Balliet, who had temporarily been assigned to the narcotics division, decided to "go out and check some of the crack houses for traffic and check some of the other known houses that were suspect in that type of activity." As they were driving by Trigg's house, which was not a residence under surveillance as a suspected narcotics house, they noticed a 1985 maroon Cadillac. The Cadillac was distinctive and Bird remembered seeing it a week before at a known crack house.

Bird and Balliet decided to set up surveillance on Trigg's house, but broke off surveillance temporarily to call Sgt. Colby, who was in charge of the narcotics division, to ask him whether surveillance should be maintained. Colby advised Officer Balliet to get into his vehicle, and advised Officer Bird to keep point on the surveillance. He further advised another narcotics officer, Officer Huffine, to stay in the vehicle which he was driving so that three mobile units would be present. Like Bird, Colby knew that Trigg's license was suspended. He found that out during some investigations that were conducted just a week or two prior to March 16, 1988.

Eventually, Trigg got into the Cadillac and drove away. Before Trigg had gotten into his automobile, the officers had checked to make sure that his license was still suspended. As Trigg drove away

from his home, the narcotics officers maintained surveillance (in their three cars) and a traffic officer named David Royse, also of the Allen County Police Department, was called and asked to "assist in making a traffic stop on a suspended driver." By the time Royse got to Trigg he was in a private laundromat parking lot in a shopping center. Royse handcuffed Trigg and placed him under arrest for driving while suspended. Royse could have simply issued Trigg a traffic citation, but he chose instead to make a custodial arrest and take Trigg to jail because he knew of Trigg's history of failing to appear in court.

Trigg was planning to do laundry and had a big bag of dirty clothes. He did not want anyone to see him with the clothes and was attempting to pull around the back of the laundromat when Officer Royse pulled into the parking lot and jumped out of his car with a revolver to arrest Trigg for driving on a suspended license, a misdemeanor. Royse then handcuffed Trigg. Trigg never attempted to flee. After Royse had handcuffed Trigg, Officer Huffine did a pat down search on Trigg. By that time, all six narcotics officers had arrived. During the pat down search, Huffine discovered two packages in Trigg's coat pockets containing cocaine. Trigg was not armed. At the time of Trigg's arrest, none of the officers had probable cause to believe that Trigg had narcotics on his person.

Analysis

The Seventh Circuit Court of Appeals has clarified what a "reasonable" arrest is for purposes of determining a pretextual arrest and the legality of a search incident to that arrest. In

United States v. Kordosky, 878 F.2d 991 (7th Cir. 1989), the court held that a search incident to arrest is legal "as long as the arresting officer possesses sufficient information to give him probable cause to arrest." Id. at 993. The officer's motive and ultimate objectives are relevant only if he did not have probable cause to arrest. Id. In United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989), the court stated:

> [W]e, as an intermediate appellate court, do not feel empowered to evaluate the reasonableness of a particular arrest based on the arrest's conformance to usual police practices. Rather, we believe that the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the fourth amendment. This proposition may be stated in another way; so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional.

Id. at 1041. In effect, for all practical purposes, the Seventh Circuit has abolished the concept of pretextual arrest in that this court is precluded from looking into the motive or objectives of Officer Royse's arrest of Trigg.

Defendant Trigg argued at the hearing on remand that Officer Royse did not have probable cause to make the traffic arrest. Trigg argued that Royse had a duty to independently verify that Trigg's license was suspended and that Royse's reliance on the information he received from the other officers was insufficient to give him

probable cause.

Probable cause exists where the facts and circumstances at the time of the arrest and of which the police had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person committed or was committing an offense. United States v. Lima, 819 F.2d 687, 688 (7th cir. 1987); United States v. Hairston, 763 F.2d 233, 235 (7th Cir.), cert. denied, 474 U.S. 854 (1985). Where there has been at least minimal communication between police officers, the courts look to the officers' collective knowledge in determining the existence of probable cause. United States v. Patino, 862 F.2d 128, 132 (7th Cir. 1988); United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979). "A police officer need not personally witness the behavior giving rise to the probable cause - even if there must be personal observation according to a state statute - and can rely on another officer's direction or a reliable informant." Chathas v. Smith, No. 87-2821, slip op at 15 (7th Cir., September 5, 1989).

The facts are clear that the narcotics officers who requested Officer Royse to assist in making the traffic arrest had confirmed that Trigg's license was still suspended. They conveyed this knowledge directly to Royse. Based on Patino, supra, Royse had sufficient knowledge that Trigg's license was suspended to give him probable cause to believe that Trigg was committing an offense when he saw Trigg driving.

In addition, the facts are clear that Royse had the authority to make a custodial arrest of Trigg for driving on a suspended

license. At the initial suppression hearing, Royse stated that the Superior Misdemeanor Traffic Court in Allen County had left the option of making a custodial arrest or issuing a summons with a court date to appear to the officer's discretion and judgment. Royse chose to make a custodial arrest because he did not feel that Trigg was a good risk for complying with the summons. Royse stated that he made his decision based on knowledge he had of Trigg's past failures to appear.

Applying the standard adopted by the Court of Appeals in Trigg, 878 F.2d at 1041, Trigg's arrest for driving on a suspended license was reasonable and constitutional. Officer Royse had probable cause to believe that Trigg was committing an offense and had the authority to effect a custodial arrest for that offense. Therefore, Trigg's arrest and the search incident to that arrest were not a violation of Trigg's Fourth Amendment rights.

Additionally, defendant Trigg raised an issue at the hearing on remand which appears to have never been adequately resolved due to the original disposition of his motion to suppress. Trigg now contends that even if the custodial arrest was proper, the search of his car was illegal and items found in the trunk of his car should be suppressed as the product of an illegal search. The only items found in the trunk were "changer bills"[1].

The government contends that Trigg cannot now seek to suppress the evidence found in the trunk, having never raised the issue

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[1]. Defendant explained to this court that "changer bills" were bundles of $1, $5 and $10 bills kept for the purpose of making change.

before. Contrary to the government's contention, Trigg has raised the issue of the evidence found in his trunk before. In Trigg's initial Motion to Suppress the Evidence or in the Alternative for an Evidentiary Hearing filed on May 26, 1988, Trigg specifically stated that "the evidence obtained after the pretext stop was illegally obtained and should be suppressed." Clearly, the evidence found in the trunk of Trigg's car was part of the evidence obtained after the stop. Also, during the initial hearing on the motion to suppress, Trigg informed the court that there was an issue as to the evidence found in his trunk. The government responded that this particular evidence would not be used in its case in chief, and therefore, was not at issue in the suppression motion. After that statement from the government, Trigg did not pursue any further inquiry as to the trunk. During the hearing on remand, however, the government stated that it was "going to use everything possible in this case that was lawfully seized pursuant to this arrest." Thus, the issue of the legality of the search of Trigg's trunk is now squarely before this court.

Defendant contends that the search of the trunk was illegal because the officers did not take the car, lock it up, have it towed and get a court order before looking in the trunk. These steps are not prerequisite to a proper search of the trunk. Having reviewed the evidence presented at the initial hearing on Trigg's motion to suppress, this court finds that the search of the trunk of Trigg's car was not illegal. The law is clear that an inventory search conducted pursuant to standard procedures does not violate

a defendant's Fourth Amendment rights. Colorado v. Bertine, 107 S.Ct. 738 (1987). Although there was conflicting testimony as to whether or not the trunk of the car was open at the scene of Trigg's arrest, the testimony was clear that the car was impounded for an inventory search pursuant to standard procedures of the Allen County Police Department. Defendant Trigg has not shown that the evidence found in the trunk was not found during the properly conducted inventory search.

Moreover, in the government's brief submitted on September 27, 1989, the government stated once again that the evidence found in the trunk of Trigg's car was not going to be used in its case in chief against Trigg, but would only come in for impeachment purposes if Trigg should testify. In United States v. Havens, 466 U.S. 620 (1980), the Supreme Court held that illegally seized evidence may be used against a defendant for impeachment purposes. The Court specifically stated that:

> [a] defendant's statement made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained an that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

Id. at 627-28.

Conclusion

Accordingly, based on the foregoing, defendant's motion to suppress all evidence obtained after his arrest for driving on a suspended license on March 16, 1988, is hereby DENIED.

Enter: November 7, 1989.

William C. Lee, Judge
United States District Court

UNITED STATES of America, Plaintiff-Appellant,

v.

William O. TRIGG, Defendant-Appellee.

No. 88-2807.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 7, 1989.

Decided July 12, 1989.

Defendant was charged with possession of cocaine with intent to distribute after a search incident to a traffic arrest revealed cocaine in his pocket. The District Court for the Northern District of Indiana, William C. Lee, J., granted defendant's motion to suppress the cocaine and incriminating statements. The Government appealed. The Court of Appeals, Flaum, Circuit Judge, held that an allegedly pretextual arrest is reasonable under the Fourth Amendment if the arresting officer had probable cause to believe that defendant had committed or was committing an offense and if the officer was authorized by state or municipal law to effect a custodial arrest for the particular offense.

Reversed and remanded.

Ripple, Circuit Judge, concurred and filed opinion.

1. Arrest ⇐58

"Pretextual arrest" occurs when police employ an arrest based on probable cause as a device to investigate or search for evidence of an unrelated offense for which probable cause is lacking; arrest serves as a means to circumvent warrant requirement of the Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Arrest ⇐71.1(6)

Under search incident to arrest exception to warrant requirement of Fourth Amendment, police officer may thoroughly search the person of a suspect after making a custodial arrest. U.S.C.A. Const. Amend. 4.

3. Criminal Law ⇐394.1(1)

"Serendipity doctrine" deems all evidence discovered during a lawful search to be admissible in later proceedings.

See publication Words and Phrases for other judicial constructions and definitions.

4. Arrest ⇐71.1(1)

Exception to warrant requirement of Fourth Amendment for search incident to arrest is a narrowly tailored doctrine designed to protect police officers from danger and prevent the destruction of evidence. U.S.C.A. Const.Amend. 4.

5. Arrest ⇐58, 63.4(1)

Allegedly pretextual arrest is necessarily reasonable under the Fourth Amendment if arresting officer had probable cause to believe that defendant had committed or was committing an offense and if arresting officer was authorized by state or municipal law to effect a custodial arrest for the particular offense; as long as police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. U.S.C.A. Const. Amend. 4.

David H. Miller, Asst. U.S. Atty., Office of the U.S. Atty., Fort Wayne, Ind., for the U.S., plaintiff-appellant.

Wanda R. Cal, Detroit, Mich., for William O. Trigg, defendant-appellee.

Before FLAUM, RIPPLE and KANNE, Circuit Judges.

FLAUM, Circuit Judge.

Defendant-appellee William Trigg was charged with one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) after a search incident to a traffic arrest revealed the presence of 53 grams of cocaine in his coat pocket. Prior to trial, Trigg moved to exclude the cocaine as well as any incriminating statements he had made after being

taken into custody on the grounds that the traffic arrest was a mere pretext to search for evidence of narcotics. The district court, after conducting an evidentiary hearing on the issue, granted defendant's suppression motion and the government appeals. For the reasons stated below we reverse and remand.

I.

On February 1, 1988, Officers Philip Bird and Dan Edenfield, then assigned to the warrants and fugitive division of the Allen County Police Department, arrested defendant Trigg on an outstanding body attachment.[1] After transporting Trigg to the lockup, Officer Bird ran a computer check which revealed that defendant was driving on a suspended license. Trigg, however, was not informed of this fact and the license was returned to the defendant without comment when he was released from custody.

On the morning of March 16, 1988, Officer Bird, now assigned to the narcotics division, decided to investigate some of the known crack houses in town for possible drug trafficking. During the course of this investigation, Bird drove by Trigg's house where he noticed a maroon Cadillac parked in the driveway. The automobile aroused Bird's interest for he remembered seeing it parked in front of a known crack house the week before.

The dubious history of the maroon Cadillac prompted Bird to request permission to set up surveillance on the automobile. Permission was granted, and two other police cars were dispatched to the scene. Shortly, thereafter, Trigg emerged from his house, entered the maroon Cadillac and drove away. Continuing the surveillance, the three police cars followed closely behind. It is undisputed, however that the officers lacked probable cause to believe that Trigg was engaged in narcotics activity at this time.

During the course of the surveillance, Bird, remembering the events of February 1, had headquarters run another check on defendant's license which revealed that Trigg's license was still suspended. This information was relayed to Officer Royse of the Allen County Police Department who was asked to assist in the stopping of a suspended driver.[2] Royse complied with this request and eventually arrested Trigg for driving on a suspended license.[3] After Trigg was handcuffed, Officer Huffine, a narcotics officer who had arrived on the scene, conducted a full pat-down search of Trigg's person. The search revealed the presence of 53 grams of cocaine in Trigg's coat pocket. This discovery caused Trigg to utter several incriminating statements to the police officers at the scene.

The discovery of the cocaine resulted in Trigg's indictment on one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Prior to trial, defendant moved to exclude all evidence obtained after the arrest on the grounds that the police had employed the traffic arrest as a pretext to search for evidence of narcotics. The district court, relying primarily on the fact that several narcotics officers had participated in a routine traffic arrest, concluded that the traffic arrest was a pretext to search for narcotics and granted defendant's motion.[4] The government appeals from this decision.

II.

[1] The subject of pretextual arrests presents some of the most intriguing historical, conceptual and practical issues in

1. The body attachment had issued due to Trigg's failure to appear in court on several occasions.

2. Although, authorized to do so, narcotics officers ordinarily do not make traffic arrests in Allen County.

3. Royse testified that in Allen County the decision to arrest an individual for driving on a suspended license was left to the individual officer's discretion. At the hearing, Royse claimed that he arrested Trigg both because he was familiar with defendant's history of failing to appear in court and because Trigg had attempted to flee. The district court, however, expressly discredited the latter assertion.

4. The district court also placed some emphasis on the fact that Royse could have issued Trigg a traffic citation but declined to do so.

the often problematic area of fourth amendment jurisprudence. By definition, a pretextual arrest occurs when the police employ an arrest based on probable cause as a device to investigate or search for evidence of an unrelated offense for which probable cause is lacking. *Cf. U.S. v. Guzman*, 864 F.2d 1512, 1515 (10th Cir.1988); *U.S. v. Keller*, 499 F.Supp. 415, 417 (N.D. Ill.1980). As such, the arrest serves as a means to circumvent the warrant requirement of the fourth amendment. The traditional response to this police tactic has been to suppress all evidence derived from the search incident to the pretextual arrest. *See Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir.1968); *Taglavore v. United States*, 291 F.2d 262 (9th Cir.1961).

[2–4] The above discussion hints at but fails to identify the source of the pretext problem. Specifically, the possibility of pretextual police activity stems from a combination of the Supreme Court's recognition of various exceptions to the fourth amendment's warrant requirement and expansive interpretation of the type of admissible evidence that may be procured through these exceptions. In the present case, the possibility that the police used the traffic arrest as a pretext to search for evidence of narcotics arises due to the confluence of three factors. The first factor is the recognition of a search incident to arrest exception to the warrant requirement. *See e.g. Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Under this exception, a police officer may thoroughly search the person of a suspect after making a custodial arrest. The second factor is the extension of this exception to all custodial arrests including those involving traffic offenses. *See United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Gustafson v. Florida*, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). The final factor is the presence of the so-called "serendipity" doctrine which deems all evidence discovered during a lawful search to be admissible in later proceedings. *See Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947). *See also* LaFave, *Case by Case Adjudication or Standarized Procedures The Robinson Dilemma*, 15 S.Ct. Rev. 127, 156 (1974). The search incident exception itself is a narrowly tailored doctrine designed to protect police officers from danger and prevent the destruction of evidence. *Chimel*, 395 U.S. at 768, 89 S.Ct. at 2042. The potential benefits to be derived from a search of the person, however, provide the police with the incentive to employ the exception as a potent investigatory tool.

The Supreme Court's response to the problem of pretextual arrests has been ambiguous. In *United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S.Ct. 420, 424, 76 L.Ed. 877 the Court, in *dicta*, asserted that, "[a]n arrest may not be used as a pretext to search for evidence." The Court, however, failed to delineate the elements of a pretextual arrest and did not indicate what the appropriate response should be. Later Supreme Court cases suffer from the same ambiguity. Although several cases have expressed concern about the potential abuse of the arrest power, *see e.g. Abel v. United States*, 362 U.S. 217, 236, 80 S.Ct. 683, 695, 4 L.Ed.2d 668 (1960); *United States v. Robinson*, 414 U.S. 218, 238 n. 2, 94 S.Ct. 467, 494 n. 2, 38 L.Ed.2d 427 (Powell J. concurring), the Court has not defined the contours of a pretextual arrest and has never excluded evidence as the product of a pretextual seizure.

While the Supreme Court has never directly confronted the issue of pretextual arrests, several Court decisions guide our analysis in the present case. Prior to 1973, it was possible for an appellate court to exclude evidence obtained during the search of a person incident to a traffic arrest on two theories. The first theory focused on the reasonableness of the search and held that a full search of the person incident to a traffic arrest was unreasonable under the fourth amendment. *See United States v. Robinson*, 471 F.2d 1082 (D.C.Cir.1972) (en banc), *rev'd United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *see also Amador-Gonzalez v. United States*, 391 F.2d 308, 315–18 (5th Cir.1968) (Wisdom, J.). The second theory focused on the reason-

ableness of the arrest and held that the arrest in the particular case was a sham and was therefore unreasonable under the fourth amendment. *See Taglavore v. United States*, 291 F.2d 262 (9th Cir.1961). In the seminal case of *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Supreme Court repudiated the first of these theories. In *Robinson*, the court held that full searches of the person incident to lawful custodial arrests including arrests for traffic violations, are always reasonable under the fourth amendment. *Id.* at 235. Thus, since the exclusionary rule only bars the introduction of evidence traceable to fourth amendment violations, *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed. 2d 370 (1985), the only relevant inquiry after *Robinson* is whether the arrest in the particular case violated the fourth amendment. The resolution of this issue in turn depends upon the delineation of the factors that may render an arrest unreasonable under that amendment.

The traditional approach to this problem deems arrests made for illegitimate purposes such as those undertaken to search for evidence of other crimes as violative of the fourth amendment. *See Henderson v. United States*, 12 F.2d 528 (4th Cir.1926); *United States v. Harris*, 321 F.2d 739 (6th Cir.1963); *Taglavore v. United States*, 291 F.2d 262 (9th Cir.1961). This approach necessarily involves a subjective inquiry into the motives of the particular police officer. *See U.S. v. Keller*, 499 F.Supp. 415 (N.D. Ill.1980); *United States v. Hill*, 666 F.Supp. 174 (D.N.Dak.1987). The utility of the subjective intent approach has been questioned in recent years, *see Massachusetts v. Painten*, 389 U.S. 560, 565, 88 S.Ct. 660, 663, 19 L.Ed.2d 770 (White J. dissenting); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 436–37 (1974); 1 W. LaFave Search and Seizure § 1.4 at 81–83 (2nd ed. 1987), but the theory still retains some support. *See United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir.1986); Burkoff, *Bad Faith Searches*, 57 N.Y.U.L.Rev. 70 (1982).

Recent Supreme Court decisions, however, cast substantial doubt upon the continuing validity of the subjective intent approach. In a trilogy of cases, the Court has stressed that fourth amendment analysis ordinarily involves "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Maryland v. Macon*, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978)). *See also United States v. Villamonte-Marquez*, 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 2577 n. 3, 77 L.Ed.2d 22 (1983). Most circuits, including our own, have interpreted this language as dictating a purely objective inquiry in evaluating the reasonableness of a particular police activity. *See U.S. v. McCarty*, 862 F.2d 143, 147 (7th Cir.1988); *United States v. D'Antoni*, 856 F.2d 975, 979 (7th Cir.1988); *United States v. Hawkins*, 811 F.2d 210, 213 (3d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 110, 98 L.Ed.2d 69 (1987); *United States v. Causey*, 834 F.2d 1179, 1182 (5th Cir.1987) (en banc); *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir.1988); *United States v. Smith*, 799 F.2d 704, 708 (11th Cir.1986). *See also United States v. McCambridge*, 551 F.2d 865, 870 (1st Cir. 1977) (pre-*Scott* case holding that an arrest is ordinarily judged by "an objective standard rather than by inquiry into the officer's presumed motives."). As a perceptive district judge has noted, however, the adoption of an objective standard substantially diminishes the chances of discovering pretextual arrests. *See United States v. Keller*, 499 F.Supp. 415, 417 (N.D.Ill.1980) (Crowley, J.).

The adoption of an objective standard does not of course end the inquiry in the present case for the relevant objective facts remain to be determined. One such factor might be the participation of police officers in activities they would ordinarily not be engaged in. *See* LaFave, Search and Seizure: "The Course of True Law ... Has Not ... Run Smooth," 1966 U.Ill.L.F. 255, 281–82. The district court relied on this consideration in the present case, repeatedly emphasizing the fact that six narcotics officers participated in a traffic of-

fense. It is difficult, however, to reconcile the district court's position with *United States v. Villamonte-Marquez*, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983). In *Villamonte-Marquez*, customs agents, acting pursuant to statute, boarded a vessel for the ostensible purpose of checking the vessel's documents. The agents, however, were accompanied by a Louisiana state policeman and had received a tip that the vessel was smuggling narcotics. Once on board, the agents and officer, after smelling marijuana conducted a thorough search of the vessel which revealed the presence of several tons of marijuana. In the Supreme Court, the defendant pointed to the presence of the police officer and argued that the document investigation was in fact a pretext to search for narcotics. The Court, however, citing *Scott*, summarily rejected this contention. *Id.* at 584 n. 3, 103 S.Ct. at 2577 n. 3.

Another potentially relevant objective factor would be the usual police practice in the area. *See United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir.1988); *United States v. Miller*, 821 F.2d 546, 549 (11th Cir.1987). Under this standard an arrest would be unreasonable if the usual police practice in the area is not to arrest an individual for a particular offense.

The "usual practices" approach is designed to prevent the arbitrary exercise of police power. *See* 1 W. LaFave *supra* at 94–95. This approach, however, is not really a response to the problem of pretextual arrests. Under a "usual practices" standard an arrest made for an improper reason will be valid so long as the decision to arrest for a particular offense is not a departure from the norm while an arrest made for proper reasons will be invalid if the decision to arrest for the particular offense is a departure from the norm. Rather the "usual practices" standard represents a far reaching check on the discretion of individual police officers to effect custodial arrests.

The Supreme Court has held that the discretionary exercise of police power may be unconstitutional in certain circumstances. In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), the Court held that discretionary license check stops of automobiles in the absence of probable cause to believe or reasonable suspicion that the driver has committed some offense are unreasonable under the fourth amendment. The Court, however, has never indicated that the discretionary exercise of the arrest power, a power that is contingent upon a prior determination of probable cause, is constitutionally significant. In fact, in *Gustafson*, the Court expressly stated:

> Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson* and there did not exist a departmental police establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue [citation omitted]. It is sufficient that the officer had probable cause to arrest and that he lawfully effectuated the arrest and placed the petitioner in custody.

414 U.S. at 265, 94 S.Ct. at 491–92.

[5] Given this language in a Supreme Court opinion, we, as an intermediate appellate court, do not feel empowered to evaluate the reasonableness of a particular arrest based on the arrest's conformance to usual police practices. Rather, we believe that the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the fourth amendment. This proposition may be stated in another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. *See United States v. Causey*, 834 F.2d 1179, 1182 (5th Cir. 1987) (en banc).

The district judge did not have the benefit of a controlling precedent on this important issue and considered a variety of factors which we deem to be irrelevant in granting defendant's suppression motion. Accordingly, we remand to the district court with directions to apply the standard we have adopted today in determining the suppression issue in the present case.

RIPPLE, Circuit Judge, concurring.

The issue presented here is a most difficult one and, as my brothers point out, the Supreme Court has not yet provided us with definitive guidance. Our task, therefore, is to extract from the existing precedent a principle sufficiently broad to permit resolution of this case. The majority's thoughtful and, indeed, scholarly discussion of the relevant constitutional concerns leads it to the correct resolution of the case before us. In accomplishing this task, however, the majority formulates a test that is broader than that needed to resolve the problem before us and, indeed, broader than that established by the Supreme Court precedent upon which it relies for its legitimacy. Read literally, the test formulated today requires a rigidity that will, in future cases, ill serve what Chief Justice Rehnquist has termed "the overarching principle of 'reasonableness' embodied in the Fourth Amendment." *United States v. Villamonte-Marquez*, 462 U.S. 579, 588, 103 S.Ct. 2573, 2579, 77 L.Ed.2d 22 (1983).

The starting point of the analysis is, in light of the recent Supreme Court precedent, not in serious dispute: in determining whether police conduct is "pretextual," an objective analysis of the police conduct is appropriate. A court is not to inquire into the officer's subjective intent. *See Maryland v. Macon*, 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2782–83, 86 L.Ed.2d 370 (1985); *United States v. Hensley*, 469 U.S. 221, 232–33, 234, 105 S.Ct. 675, 682–83, 83 L.Ed.2d 604 (1985); *Villamonte-Marquez*, 462 U.S. at 584 n. 3, 103 S.Ct. at 2577 n. 3; *Scott v. United States*, 436 U.S. 128, 136–37, 98 S.Ct. 1717, 1722–23, 56 L.Ed.2d 168 (1978). It is at the next step in the analysis that the precedent becomes ambiguous and disagreement understandably occurs. As our colleagues on the Tenth Circuit put it, we must determine "what objective elements are dispositive in determining whether a pretextual intrusion is unconstitutional." *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir.1988). In resolving this issue, many thoughtful jurists and commentators take the position that "the proper inquiry ... is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of an invalid purpose." *United States v. Smith*, 799 F.2d 704, 709 (11th Cir.1986); *see also Guzman*, 864 F.2d at 1517; *United States v. Causey*, 834 F.2d 1179, 1186–90 (5th Cir.1987) (en banc) (Rubin, J., dissenting); 1 W. LaFave, Search and Seizure § 1.4(e), at 92–94 (2d ed.1987). By contrast, others have maintained that a more narrow inquiry ought to measure the objective reasonableness of police actions. As the majority in *Causey* put it: "[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry." 834 F.2d at 1184.

The first approach certainly can claim that it promotes the values underlying the fourth amendment. It permits the court to focus on the "reasonableness" requirement of the fourth amendment, but does not require an inquiry into the officer's subjective intent. *See Guzman*, 864 F.2d at 1517. Under this approach, the court can inquire into whether the officer's actions conformed with the usual conduct of law enforcement officers similarly situated. Thus, there is accountability for the arbitrary exercise of discretionary police power. This approach is not, however, without its institutional costs. The required inquiry is, in practical application, not very different from that which would be undertaken if a subjective approach were employed. Law enforcement authorities would operate under the apprehension that their actions—which often require the exercise of great discretion—would be subject to misinterpretation months later in the antiseptic atmosphere of the courtroom.

In any event, as my brothers point out, it may well not be open to us to pursue this first route. In *Villamonte-Marquez*, the Supreme Court appeared to reject definitively the argument that deviations from normal police practice—albeit deviations still within the bounds of legal authority—may be considered as evidence of unreasonableness. *See Villamonte-Marquez*, 462 U.S. at 584 n. 3, 103 S.Ct. at 2577 n. 3 (citing *Scott*, 436 U.S. at 135–39, 98 S.Ct. at 1722–24). Notably, however, the Supreme Court has *not* articulated the rigid position, suggested by the panel majority, that the existence of legal authority to undertake an action precludes *all* judicial inquiry into the reasonableness—in the constitutional sense—of the action. The Court has left open, and I suggest we should leave open, the possibility that gross abuse of authority, antecedent to the police action directly under scrutiny, might require a determination that the police action, taken as a totality, violates the fourth amendment. The necessity for this "safety valve" was described in stark terms by Judge Patrick Higginbotham in his separate opinion in *Causey*:

> Serious questions abound in the use of otherwise valid warrants to pocket a one-time pass to the strictures of the fourth amendment rather than to prosecute the offense for which probable cause was found. Stated more directly, there is a risk that with the storage and retrieval capability of today's computers, warrants may function in a manner similar to the old general writs of assistance.

Causey, 834 F.2d at 1186 (footnote omitted). Law enforcement authorities who stockpile arrest warrants for traffic offenses or nonpayment of library fines in order to have a "ready-reserve" when arrest (or harassment) of a particular citizen is desired deserve no protection in the name of judicial restraint. While the test formulated today may be read as precluding judicial inquiry even in the face of such lawlessness, I have no doubt that, when faced with such an abuse, the court would not countenance it.

In the case before us, we have no such gross abuse. Viewed objectively, Mr. Trigg was arrested because he was observed driving with a suspended license. The police had acquired that information lawfully and even confirmed its accuracy before making the arrest. The arrest and search were conducted within the limitations on police conduct established by law. The exclusionary rule is meant to deter unlawful police activity that results in unwarranted "incursions to an individual's personal liberty." *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 110, 98 L.Ed.2d 69 (1987). Here, there was none. That the consequences of the lawful arrest were different than those that usually accompany an arrest for a suspended driver's license is the product of Mr. Trigg's risk-taking, not any sanctionable conduct on the part of the officers. Accordingly, I join the judgment of the court.



Tyrone Antonio JOHNSON-EL, Arnold Fredrick Hamilton-El, David Scott Hill-El, Appellees,

v.

Vincent C. SCHOEMEHL, Edward F. Tripp, L.T. Brown, Kelly Parks, Appellants,

The City of St. Louis.

No. 88-1252.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 23, 1988.

Decided May 22, 1989.

As Modified July 17, 1989.

Pretrial detainees at city jail brought suit under § 1983 challenging conditions of confinement. The United States District Court for the Eastern District of Missouri,

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA)
)
v.) NO. F CR 88-12
)
WILLIAM O. TRIGG)

ORDER

Defendant Trigg has filed a motion to supress. An evidentiary hearing was held on June 20 and June 21, 1988. The motion is fully briefed. For the following reasons, the motion will be granted.

I.

Factual Background

On February 1, 1988, defendant Trigg was arrested on a body attachment. Tr., p. 30. Allen County police officers Philip Bird and Dan Edenfield, who worked in the warrants and fugitive division at that time, see Tr., pp. 27, 132, were attempting to serve a felony drug warrant on a person named James Mudd when they encountered Trigg. Tr., p. 28. Trigg was driving a brown Jeep and Officers Bird and Edenfield were following him. Tr., p. 29. Trigg pulled over. Tr., p. 29. Bird and Edenfield were going to drive on by, but Trigg got out of his Jeep and began waving his arms in the middle of the road. Tr., p. 29. Bird saw Trigg and he and Edenfield stopped their police car in the middle of the intersection, approached Trigg and asked him, "What's going on? Who are you? What do you want?" Tr., p. 29.

Trigg told them who he was and they arrested him for an outstanding body attachment. Tr., pp. 29-30. He was then transported to the lockup, and the body attachment was processed. Tr., p. 30. During the process of arresting Trigg on the body attachment, the officers discovered that his license was suspended. Tr., p. 30.[1/]

Trigg was not arrested for driving with a suspended license. Tr., p. 31. Neither of the officers informed Trigg that his license was suspended, and there is no dispute that there was ample opportunity for them to do that. Tr., p. 31. Two reasons were given by the officers for not arresting Trigg on the suspended license: they say they did not see him driving (which the court finds hard to believe since they were following behind him), Tr., p. 31, and they say that it is not normal for a warrants officer to make a traffic arrest. Tr., p. 31. Trigg informed Officer Bird, however, that he was in fact driving the vehicle. Tr., p. 31.

After defendant Trigg had been processed on the body attachment, his license was returned to him, Tr., p. 144, and he was released from custody. Tr., p. 144. Trigg, as noted earlier, was never informed by the officers that his license was suspended and he had no independent knowledge that his license was suspended. Trigg had had problems with his license prior to February 1, 1988. Tr., p. 146. It was suspended in August, 1987, when he failed to take action on some speeding tickets. Tr., p. 146. But he

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1/ There is an immaterial dispute about whether this was discovered when Trigg was first arrested, while in the police car, or while he was at the lockup. The court finds that the police officers first discovered the suspended license at the lockup.

was told that his license was valid when he called on December 15, 1987, after he had paid the tickets. Tr., p. 146. So on February 1, 1988, Trigg supposed that he had a valid driver's license. Tr., p. 147.

Trigg never heard anything about the suspended license again until March 16, 1988. On that date Officer Bird, who had just been assigned to the narcotics division, arrived at work early and found the doors locked. Tr., p. 32. He and another officer, Officer Balliet, who had temporarily been assigned to the narcotics division, decided to "go out and check some of the crack houses for traffic and check some of the other known houses that were suspect in that type of activity." Tr., p. 32. As they were driving by Trigg's house, which was not a residence under surveillance as a suspected narcotics house, Tr., pp. 53, 121, they noticed a 1985 maroon Cadillac. Tr., p. 32. The Cadillac was distinctive and Bird remembered seeing it a week before at a known crack house. Tr., pp. 32, 53.

Bird and Balliet decided to set up surveillance on Trigg's house, but broke off surveillance temporarily to call Sgt. Colby, who was in charge of the narcotics division, to ask him whether surveillance should be maintained. Tr. p. 33. Colby advised Officer Balliet to get into his vehicle, and advised Officer Bird to keep point on the surveillance. Tr., p. 120. He further advised another officer, Officer Huffine, to stay in the vehicle which he was driving so that three mobile units would be present. Tr., p. 120. Like Bird, Colby knew that Trigg's license

was suspended. Tr., p. 120. He found that out during some investigations that were conducted just a week or two prior to March 16, 1988. Tr., p. 120.

Eventually, Trigg got into the Cadillac and drove away. Tr., pp. 33-34. Before Trigg had gotten into his automobile, the officers had checked to make sure that his license was still suspended. Tr., p. 35. As Trigg drove away from his home, the narcotics officers maintained surveillance (in their three cars) and a traffic officer named David Royse, also of the Allen County Police Department, was called and asked to "assist in making a traffic stop on a suspended driver." Tr., p. 75. By the time Royse got to Trigg he was in a private laundromat parking lot in a shopping center. Tr., p. 81. Royse handcuffed Trigg and place him under arrest for driving while suspended. Tr. p. 77. Royse could have simply issued Trigg a traffic citation, see Tr., p. 79, but he chose instead to make a custodial arrest and take Trigg to jail. Tr., p. 79.

Trigg was planning to do laundry and had a big bag of dirty clothes. Tr., p. 148. He didn't want anyone to see him with the clothes (he was probably embarrassed) and was attempting to pull around the back of the laundromat when Officer Royse pulled into the parking lot and jumped out of his car with a revolver to arrest Trigg for driving on a suspended license, a misdemeanor. Tr., p. 148. Royse then handcuffed Trigg. Tr, p. 149. Trigg never attempted to flee. Tr., p. 148.[2/] After Royse had handcuffed Trigg, Officer Huffine, also a narcotics officer, did a pat down

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2/ Royse testified that when he attempted to arrest Trigg,

(Footnote continued on following page)

search on Trigg. Tr., pp. 78, 94, 95. By that time all six narcotics officers had arrived. During the pat down search, Huffine discovered two packages in Trigg's coat pockets containing cocaine. Tr., pp. 95, 96. Trigg was not armed.

There are a number of extremely important undisputed facts which the court wishes to emphasize. Trigg was never informed by any officer after the February 1, 1988 arrest on the body attachment that his license had been suspended. Tr., pp. 61, 144. Second, the narcotics officers considered Trigg a suspect of narcotics trafficking on March 16, 1988. Lastly, none of the narcotics officers, however, had probable cause to believe Trigg had narcotics on his person and they testified to that effect. Tr., pp. 73, 81, 99, 123.

II.

Analysis

"The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search . . . ." Murray v. United States, ___ U.S. ___, No. 86-995. slip op. June 27, 1988). The rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is acquired as an indirect result of

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Trigg attempted to flee. Tr., p. 79. Trigg testified that he did not attempt to flee. Tr., p. 148. Based on the credibility of the witnesses and the surrounding circumstances the court finds that Trigg did not attempt to flee and the court specifically discredits Royse's testimony on that point. Trigg was simply going to do his laundry. Royse was brandishing his pistol. Trigg was unarmed. Further, it is undisputed that Trigg waved the police car down on February 1, 1988, when he was arrested on the body attachment. The court simply doesn't believe Mr. Trigg attempted to flee on March 16, 1988.

an unlawful search. See Nardone v. United States, 308 U.S. 338, 341 (1939). The exclusionary rule is principally designed to deter violations of the fourth amendment. See, e.g., United States v. Leon, 468 U.S. 897, 906 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960). By excluding evidence discovered in violation of the fourth amendment, the rule "compel[s] respect for the constitutional guarantee in the only effectively available way, by removing the incentive to disregard it." Id. at 217.

Defendant Trigg was charged in this case with possession with intent to distribute cocaine. He contends that his fourth amendment right to be free from unreasonable searches and seizures was violated when he was arrested for driving on a suspended license on March 16, 1988, so that the cocaine (just over 53 grams) which was found during the pat down search incident to the arrest and any statements allegedly made by the defendant regarding his guilt, should be suppressed. Two importan rth amendment principles butt heads in this case. The first is that the fourth amendment is not violated when evidence is obtained during a search incident to a lawful arrest. See Chimel v. California, 395 U.S. 752, 763-64 (1969). The second is that the fourth amendment is violated when law enforcement officers use an arrest as a pretext to search for evidence which could not otherwise be searched for. See United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

The government contends that "[t]here is no question that the defendant Trigg was searched pursuant to a lawful arrest for driving while suspended." See Government's Brief in support of

denial of motion to suppress, p. 2. Although the defendant disputes the lawfulness of the arrest,[3/] the court agrees that the arrest was lawful. But even a lawful arrest, if it is a pretext to conduct an otherwise unlawful search, violates the fourth amendment.

"An arrest may not be used as a pretext to search for evidence." Lefkowitz, 285 U.S. at 467. Pretext may be shown where a defendant is arrested for a minor offense so that police can search for evidence of some other unrelated offense for which they lack probable cause to arrest or search. United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) citing Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961). Similarly, "[a]n arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth and fourteenth amendments." United States v. Hill, 666 F.Supp. 174, 176 (D.N.Dak. 1987). In United States v. Jones, 452 F.2d 884, 888 (8th Cir. 1971), the Eighth Circuit stated generally that a search will not be sustained "if the arrest for a traffic violation is a mere pretext for an exploratory search." While a delayed arrest is not necessarily improper, the delay in making an arrest, particularly where a search incidental to the arrest occurs, may also lead to the conclusion that the arrest was a mere pretext for an otherwise unlawful search. See, e.g., Amador-Gonzales v. United States, 391 F.2d 308, 313-14 (5th Cir. 1968).

If an arrest is pretextual, in violation of the fourth amendment, evidence seized during a related search may be excluded. While the exclusionary rule has been harshly criticized it serves an important purpose and its deterrence objectives, particularly in a case where a pretextual arrest is made, protect citizens against unreasonable searches. Chimel, 395 U.S. at 763-64. The fourth amendment was in large part "a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped to speed the movement for independence." Id. at 761. Few persons have

> a life so blameless that some reason to arrest them cannot be found, whether it be for entering an intersection when the light is on caution, or from violating a zoning regulation, or for having an expired brake tag. The fourth amendment protection against arrests without probable cause is designed to protect citizens against being arrested for such a matter and there is no objective justification for the arrest save the police's desire to question the person in custody about a matter for which they lack the authority to make an arrest.

United States v. Causey, 834 F.2d 1179, 1189 (5th Cir. 1987). If

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3/ The defendant argues that he was arrested for a violation of I.C. 9-1-4-52(a), which provides that "a person shall not operate [a] motor vehicle upon the public highways while his license or permit is suspended, impounded, or revoked." Indiana Code 9-1-1-2(q) defines public highway as "[t]he entire width between boundary lines of every way in this state, public [sic] maintained, when any part thereof is open to use of the public for purposes of vehicular travel, including the streets and alleys in cities and towns." In Indiana a "parking lot is not a street or highway." See City of Evansville v. Walker, 318 N.E.2d 388, 389 (Ind.App. 1974). Noting Royse's testimony that he was seen and arrested in a parking lot, Trigg argues that his arrest was unlawful, that he was not "operating" on a pubic highway. But Royse also testified that he had seen Trigg on South Anthony, a public street. See Tr., p. 76. And Royse relied on a radio bulletin issued after Sergeant Colby called the police dispatcher. See Tr., p. 121. Colby had seen Trigg driving, Tr., p. 121, and Royse's reliance on the bulletin was reasonable. See United States v. Longmeyer, 761 F.2d 411, 416 (7th Cir. 1985). The arrest was therefore lawful.

pretextual arrests were condoned, most Americans could be subjected to arrest for minor offenses. Police who wanted to arrest an individual without probable cause might simply sit on a suspended license or leaf through a file to determine whether they could find some reason to arrest a suspect for whose arrest they otherwise lacked probable cause. While the consequences of the exclusionary rule are severe, the consequences of fourth amendment violations are intolerable.

The government argues that the old rule (the rule that the pretextual nature of an arrest and search turns on the subjective motivation of an arresting officer, see Amador-Gonzeles v. United States, 391 F.2d 308 (5th Cir. 1968)), no longer applies and that an objective standard now governs the pretext inquiry. The court agrees. In United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987), the Fifth Circuit, in an en banc opinion, abandoned the subjective motivation standard in favor of an objectively reasonable standard. The court based its decision on a trilogy of United States Supreme Court cases. This court is completely persuaded, both as a matter of precedent and reasoning, to follow the Fifth Circuit's decision in Causey, and to apply a standard of objective reasonableness. When police officers are objectively doing what they are legally authorized to do, the results of their actions should not be called into question on the basis of any subjective intent with which they acted. Conduct otherwise lawful in every respect on the part of the police is not rendered unconstitutional by their irregular subjective intent alone.

While the court accepts without hesitation the standard of objective reasonableness in determining whether Trigg's arrest was pretextual, the acceptance of that standard does not end the inquiry. A pretextual arrest is still unconstitutional. The question which must be asked, to determine whether the arrest was pretextual under the objective standard, is whether a reasonable officer would have made the arrest, absent invalid purposes. See United States v. Smith, 799 F.2d 704, 709, 711 (11th Cir. 1986). As a panel of the Fifth Circuit has stated,

> When a defendant alleges that an arrest was pretext to conduct an otherwise impermissible search, the appropriate inquiry is whether a reasonable officer would have made the arrest absent an illegitimate motive to search. If a reasonable officer would not have made the arrest absent illegitimate motive, then the resulting search . . . is unlawful.

United States v. Johnson, 815 F.2d 309, 315 (5th Cir. 1987) (citation omitted). The principle espoused in Johnson applies to an arrest made absent a legitimate motive, objectively determined.

In a case remarkably similar to the case before the court, United States v. Hill, 666 F.Supp. 174 (D.N.Dak. 1987), the court held that a pretextual arrest supported the suppression of controlled substances discovered as a result of a pat down search. In Hill, the defendant, like Trigg, had been operating on a suspended license. This information was passed from narcotics officers to an on-duty traffic officer in a marked squad car. Id. at 175. The narcotics officers informed the traffic officer to stop the defendant for the suspended license if he moved his car. When defendant Hill left his residence, he was stopped by the traffic

officer and placed under arrest. Other officers arrived and conducted a pat down search. Id. at 175.

During the pat down search, a number of things were discovered, including an empty gun holster on the back of Hill's belt and two plastic bags in a film canister on Hill's person. Id. at 175. The bags in the canister contained controlled substances. Narcotics officers, who had peered through the left window of Hill's car, saw the butt of a gun protruding from under the front seat and removed the gun from the car. At trial, Hill moved for suppression of the handgun on the theory that it was seized following a pretextual arrest. He also moved for suppression of the controlled substance. Id. at 176.

Citing Lefkowitz, and noting that pretextual arrests are condemned by the fourth amendment, the court held that suppression of the controlled substance discovered as a result of the pat down search was proper, but reasoned that because the loaded handgun was in plain view under the front seat, its seizure did not violate the fourth amendment. The officers were entitled to seize the handgun under the "automobile exception" to the warrant requirement. See Chambers v. Maroney, 399 U.S. 42 (1970). Consequently, the seizure of the handgun was not the product of a search arising out of the pretextual stop.

Hill's argument for suppression of the controlled substance was based upon the fact that he was under surveillance by narcotics officers relating to drug trafficking. Id. at 176. The officers, it was established, wanted Hill stopped on the suspended

driving violation, believing Hill would probably have drugs on his person. The court found that the narcotics officers, as a pretext to search for controlled substances, wanted Hill stopped for driving on a suspended license. Id.

The facts in the case at bar are remarkably similar and, applying the objectively reasonable standard, the court is compelled to conclude that Trigg's arrest was a pretext for an otherwise unlawful search. It is undisputed that none of the narcotics officers had probable cause to arrest or search Trigg for a narcotics violation. It is also undisputed that those same narcotics officers had Trigg under surveillance for a potential narcotics offense. They knew that Trigg's license was suspended and they arranged for Officer Royse to pull him over and arrest him for driving on the suspended license. It is undisputed that the narcotics officers who were doing the surveillance on Trigg initiated the call to Officer Royse so that Trigg would be arrested for driving with a suspended license.

When Officers Bird and Balliet went out on March 16, 1988 to check "known houses that were suspect in [narcotics] activity," Tr., p. 32, and saw the Cadillac in Trigg's driveway, they called Sergeant Colby at home to ask whether surveillance should be maintained. Colby, as he testified, "Took charge of the scene." Tr., p. 120. Officer Baillet was advised to get into his vehicle and Officer Bird kept point on the surveillance. Tr., p. 120. With Officer Huffine in his own vehicle, Colby had three "mobile units." Tr. p. 120. When Colby became aware that Trigg was

driving, he called the dispatcher and asked for the closest marked unit to be sent to arrest Trigg. Tr., pp. 120-21.

It seems to the court, applying the objective standard, that the actions of the narcotics officers cannot possibly be classified as reasonable. Reasonable officers might have called Officer Royse to make the traffic arrest, if they just happened across Trigg and if they happened to know that his license was suspended, but they would not have surveilled Trigg and shown up on the scene during the arrest in order to make a pat down search, absent some illegitimate motive. It is manifestly unreasonable for so many narcotics officers to assist (or participate with) a traffic officer in arresting someone on a suspended license.[4/] The evidence forces the conclusion that the arrest was a pretext to search for the narcotics for which they were looking with out probable cause. Lefkowitz condemns those kinds of arrests. Lefkowitz, 285 U.S. at 467.

To further manifest the unreasonableness of the arrest, the officers sat on knowledge of the suspended license from February 1, 1988 to March 16, 1988, when they made the arrest. It is true that none of these officers had seen Trigg driving on his suspended license after February 1, 1988, but reasonable officers would not suddenly become so concerned about a suspended license so as to set up surveillance, and then arrest the driver,

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4/ The court observes that Trigg was probably the beneficiary of the most attention from the police of anyone ever arrested for driving with a suspended license.

utilizing a virtual armada of officers and squad cars, absent some illegitimate motive, i.e., the desire to conduct a search of a narcotics trafficking suspect without probable cause. This is not a case where the officers just happened to see Trigg driving and pulled him over, but rather, a case where they wanted to pull him over after he had become a narcotics suspect. While the court is not suggesting that the officers had some duty to pull Trigg over on the suspended license prior to March 16, 1988, there is absolutely no doubt that the arrest on the suspended license was a pretext; that the officers used the suspended license to arrest Trigg because they thought he had narcotics and had no probable cause to search him in order to confirm that thought.

There is more evidence of pretext. Officer Royse testified that he could have issued Trigg a citation, but chose instead to arrest him. That in itself might be deemed reasonable, but for the fact that the officers sat on their knowledge of the suspended license for over a month before choosing the harsher of the two options, and but for the fact that the harsher of the two options was chosen only after Trigg was placed under surveillance for narcotics trafficking. It should be remembered that Trigg admitted to the officers who arrested him on February 1, 1988, that he was driving the Jeep. And yet they chose not to arrest him. And the narcotics officers testified that while it was not policy for them to make traffic stops, they had the authority to arrest Trigg on a suspended license. And yet Trigg was not arrested on February 1, 1988, and he was not arrested by the narcotics officers, but

rather, Officer Royse was called to make the arrest, and was then assisted by the narcotics officers, one of whom helped conduct the pat down search. If the suspended license was really the concern, that issue could have been raised earlier and by way of a citation instead of an arrest with three cars of narcotics officers.

III.

Conclusion

Judged by an objective standard, Trigg's arrest for driving with a suspended license and the pat down search conducted incident thereto was simply a pretext for an otherwise unlawful arrest and search, in violation of Trigg's fourth amendment rights. Defendant Trigg's motion to suppress is GRANTED. The cocaine which was seized as a result of the pretextual arrest, as well as any derivative testimonial evidence, will be EXCLUDED. This is a harsh result, but it is called for in this case.

Enter: August 16, 1988.

William C. Lee, Judge
United States District Court